United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-1827

To be argued by
CAROL B. AMON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1827

UNITED STATES OF AMERICA,

Appellee,

—against—

PEDRO MORELL and RAMON BRUZON,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1827

UNITED STATES OF AMERICA,

Appellee,

—against—

PEDRO MORELL and RAMON BRUZON,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Pedro Morell and Ramon Bruzon appeal jointly from judgments of conviction of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered May 10, 1974, which judgments convicted appellants, after a jury trial,* of knowingly conspiring together to distribute a quantity of cocaine hydrochloride in violation of Title 21, United States Code § 846 (Count One), and knowingly possessing with intent to distribute approximately four kilograms of cocaine hydrochloride in violation of Title 21, United States Code § 841(a)(1) (Count Two). On May 10, 1974, both appellants were sentenced to terms of eight years imprisonment and special parole terms of five years. Appellants are presently free on bail pending appeal.

* A verdict of guilty was returned by the jury after three days of trial from March 5 through March 7, 1974; a prior trial of appellants commenced on February 27, 1974 but ended in a mistrial on March 4, 1974.

On appeal, appellants make the following claims: (1) appellants were deprived of a fair trial by the alleged failure of the Government to provide defense counsel with the details of the arrest, plea and sentence of the Government's main witness; (2) appellants were so prejudiced by the prosecutor's summation that a new trial is required; (3) a warrantless search of appellants' store made after entry of the agents to the premises without notice of their purpose and authority required suppression of the narcotics seized therein; (4) failure of the Government to identify, produce or disclose the whereabouts of a confidential informant alleged to have participated in the conspiracy requires a new trial.

Statement of the Case

A. The Government's Case

Jeffrey Scharlatt, a supervisory agent of the Drug Enforcement Administration, formerly known as the Bureau of Narcotics and Dangerous Drugs, provided the sole testimony at a hearing held on February 27, 1974, before the trial judge, on a motion made by appellants to suppress the cocaine seized from their premises at the time of their arrest on May 25, 1972 (3-51).* At trial, Agent Scharlatt and Alfredo Valdez, an informant for the Drug Enforcement Administration, testified for the Government (314-457). The following facts were adduced through their testimony.

Alfredo Valdez was arrested by federal authorities in Miami in 1969 for possession of a kilogram of cocaine (313; 353-356). He thereafter pled guilty and was sentenced to

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* Numbers in parenthesis refer to pages of the transcript of the suppression hearing and the trial.

three years probation (317; 356-357).* Subsequent to his plea of guilty, Valdez began working as an informant for the Bureau of Narcotics and Dangerous Drugs (317-319; 358). In that capacity, prior to his involvement in appellants' case, he established his reliability by working on eight cases which resulted in arrests and convictions (7; 15). There were no charges pending against Valdez either on May 25, 1972 or at the time of his trial testimony (349). Furthermore, no promises, apart from payment for the cases on which he worked, or threats were ever made to him by any law enforcement officials.** He was not paid for testifying at appellants' trial (349-351; 358-362; 414).

Valdez was introduced to appellants Morell and Bruzon in April of 1972 by an individual identified as "Louie." At that time, Louie introduced appellants as the "two guys" in the cocaine business whom he had previously mentioned to Valdez (322-323; 368-378). With that explanation, Louie departed, taking no part in any narcotics related conversations or transactions involving the three men (322-323; 368-378).

At their initial meeting, Bruzon and Morell informed Valdez that they expected a shipment of ten kilograms of cocaine to arrive from Columbia shortly (324). Valdez provided Bruzon with his phone number and asked him to contact him as soon as the merchandise arrived. Appellants, in turn, gave Valdez a card with the address of their Queens store on 31st Avenue between 90th and 91st Street—a location where appellants kept their plant supplies and work clothes (324-326; 378). Valdez visited this store

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* On both direct and cross-examination, Valdez stated he could not remember the exact date he was sentenced. According to his testimony, it could have been in either 1970 or 1971 (317, 356-357).

** Valdez testified that he received $1500 from Agent McElroy of the Drug Enforcement Administration for work on appellants' case (351).

several times between this first meeting and May 25, 1972. On those occasions, only Valdez and appellants were present at the store and the conversation involved the timing of the arrival of the shipment of cocaine (327-331).

On May 23, 1972, Bruzon called Valdez and told him to meet him at the Escorial Bar on 85th Street and 37th Avenue at 10:00 p.m. the following evening (332-333). Valdez met with Bruzon at that location as planned, where he was informed by Bruzon that four kilograms of cocaine were available for sale (335). After some discussion, Bruzon agreed to a price of $12,000 per kilogram, but gave Valdez Morell's address and instructed him to have Morell approve that price (335-336).

At approximately 1:00 a.m. on the morning of May 25, 1972, Valdez met with Morell at his home. Morell agreed to the $12,000 per kilogram price and requested that Valdez meet with him and Bruzon at their store between 4:00 p.m. and 6:00 p.m. that afternoon to consummate the deal (339).

Prior to this planned meeting, at approximately 2:00 p.m. on the afternoon of May 25, Valdez met at his apartment with Agent Eugene McElroy of the Drug Enforcement Administration. He discussed with McElroy his earlier conversations with Bruzon and Morell. After being informed of the proposed deal, McElroy made a precautionary search of both Valdez and the apartment for narcotics (341).

Valdez and McElroy met with Agent Scharlatt and other agents of the Drug Enforcement Administration approximately an hour later that same afternoon in a parking lot in Jackson Heights in Queens, New York, where these agents were also apprised of the plans (8, 18). At this time, the agents searched Valdez' car for narcotics and provided him with an attache case containing $48,000 in official Government funds (19; 342; 419). It was agreed

that when Valdez came out of appellants' store and removed the attache case from the trunk of his car, this would be a signal to the agents that he had seen the cocaine inside the store (8-21).

Valdez arrived at appellants' store at approximately 4:30 p.m. (8). He was greeted at the door by Morell who escorted him to the basement of the premises. There, they met with Bruzon who was in the process of "cutting" (mixing) cocaine with dextrose and placing it into plastic bags (344). Valdez observed Bruzon engaged in this activity for approximately thirty minutes and discussed with both men the effect of this procedure on the value of cocaine.* No one else was present in the store at this time (343-344; 399-406).

When Bruzon completed mixing and bagging the cocaine, Valdez informed Morell that the money for the narcotics was in the trunk of his car. Valdez and Morell then walked out front of the store together towards Valdez' car (345-356). After Valdez opened the trunk and removed the attache case—the pre-arranged signal to the agents—the agents followed the two men back into the store and placed Morell under arrest.** Valdez further signaled to the agents that the cocaine was in the basement by shouting a profanity (340-346).

Jeffrey Scharlatt testified that he and other agents of the Drug Enforcement Administration instituted a surveillance of appellants' premises at 90-19 31st Avenue in Jackson Heights at approximately 4:00 p.m. on May 25, 1972 (4188). Scharlatt observed Valdez enter the store and then exit it approximately one-half hour later in the

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* Valdez identified a photograph marked as Government's Exhibit 1, which depicted cocaine and mixing materials, as an accurate representation of the basement area of appellants' store as he observed it on May 25, 1972 (343).

** A simulated arrest was made of Valdez.

company of the appellant Morell. Valdez was observed to walk to his car, followed half-way by Morell, who then stopped and watched Valdez continue on, open the trunk and remove the attache case. Both Morell and Valdez were observed by Scharlatt to return to the store, whereupon they were followed into the store by agents (8-9; 21; 421; 430-434). When Scharlatt arrived, Morell had already been arrested (10; 24; 421). After Morell's arrest, Scharlatt went down into the basement through an open trap door in pursuit of appellant Bruzon. When he arrived at the bottom of the stairs, he observed Bruzon running towards the back door and followed after him (11-12; 422). Bruzon was quickly apprehended by other agents stationed at the back of the store before Scharlatt reached him. On his way back upstairs, Scharlatt observed a shopping bag surrounded by plastic bags containing a white powder, cocaine, on the basement floor to the right of the stairs (12-15; 423-424).* A picture was taken of the scene (Government's Exhibit 1) which was identified by Agent Scharlatt. The cocaine and other items were thereafter seized (14; 424).

The motion made to suppress the narcotics seized from appellants was denied by the District Court at the conclusion of the hearing on February 27, 1974 (50). A renewed motion to suppress argued by defense counsel for appellant Morell at the time of sentencing on May 10, 1974, was also denied, the trial court judge finding that the arrest was valid and that the agent was lawfully in the location where he observed the narcotics in plain view (681).

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* A stipulation entered into between the Government and counsel for appellants was read into the record at the conclusion of the Government's case in which it was agreed by all parties that the bags of white powder seized—Government's Exhibits 2-7—contained cocaine hydrochloride.

B. The Defense

Appellants, who both took the stand and testified in their own behalf, presented a unified theory of their defense; to wit: that they were men of fine character * who were not involved with Valdez or narcotics, and who were merely present in their store with four kilograms of cocaine on May 25, 1972. In an apparent effort to explain the presence of the cocaine, they offered testimony that a man named Urbano Ramos, allegedly a friend of Valdez, ran a fruit store on the premises and had previously been making coconut candy in the area of the basement where the cocaine was found (491-492; 530). It is interesting to note that although appellants called no less than five witnesses to testify to the existence of Urbano Ramos and the fruit stand, the fact of their existence was not, as appellants contend, denied by Valdez (391-392).** In any event, appellants agreed that Urbano Ramos was not present in the store on May 25, 1972 (517; 542).

More specifically, Morell testified that on the evening of May 24, 1972, he and his family were at his brother-in-law's home until 2:00 o'clock the following morning celebrating his wife's birthday (486-487). This alibi was corroborated by Morell's wife (595-597).

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* Three character witnesses, Leonard Hetson, Frank Garmendia, a personal friend of both Morell and Bruzon, and Joseph Lima testified at trial on behalf of both appellants as to their good reputation in the community for honesty and truthfulness.

** Angelo Sablon, Mario Mesa, Antonio Suarez and Amanda Costa all testified to the existence of a fruit stand run by Urbano Ramos, also known as "Chino", on the premises of 90-19 31st Avenue (559-589). Through Albert Einstein, an employee of the New York Department of Taxation and Finance, the defense introduced an application to collect New York sales tax at that location which had been filled out by Urbano Ramos.

Morell further testified that he and Bruzon were in the paint business together and that they sublet the store at 90-19 31st Avenue for storage of their equipment from Urbano Ramos. Mr. Ramos, according to Morell, operated a fruit and vegetable stand on the premises (488). Morell stated he knew Valdez only as a friend of Ramos who had visited Ramos at the store on several occasions (494). It was Morell's testimony that a week or two prior to his arrest on May 25, 1972, Ramos had closed his vegetable stand and was making coconut candy on the premises.*

Morell further testified that on May 25, 1972, Valdez came to the store looking for Ramos. Morell informed Valdez that Ramos was not there and conversed with him for a few minutes (503). According to Morell, he told Valdez that Bruzon was downstairs whereupon Valdez proceeded downstairs and remained for approximately twenty minutes. It was Morell's testimony that no one else was present in the store at that time (516). Morell denied that he had gone to the basement on that occasion or that he had any knowledge of cocaine on the premises (505).

Bruzon testified, as did Morell, regarding their paint business and lease arrangement with Urbano Ramos (521-527). Bruzon denied both having spoken with Valdez on the phone on May 24, 1972 and having seen him on that date (530).

Bruzon explained that hewas in the basement of the store on May 25, 1972 cleaning his brushes when Valdez came down, greeted him and asked about Ramos (532). (512).

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* Two witnesses, Angelo Sablon and Mario Mesa, called by the defense to testify to the existence of Ramos and the vegetable stand at 90-19 31st Avenue, contradicted Morell's testimony on this point, stating that the vegetable stand was still open on the date of appellants' arrest (567, 576).

Bruzon stated that for the next twenty minutes Valdez said nothing but walked around in the front of the basement in the area where Ramos had been making coconut candy (532). After Valdez left, Bruzon said he was walking down the back corridor to empty the garbage when agents called out "Police" (534).

Bruzon denied having spoken with Valdez about cocaine and denied mixing cocaine in the basement of the store on the date of his arrest (535).

ARGUMENT

POINT I

The Government satisfied its obligation under *Brady* v. *Maryland*, by placing on the record the facts concerning the arrest and conviction of its main witness.*

Appellants' argument that they are entitled to a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, due to the alleged suppression by the Government of the details of the arrest, plea and sentence of its main witness, is without merit.

The Government elicited the criminal history of its main witness, Alfredo Valdez, on direct examination. Through Valdez's testimony, it was clearly set forth before the jury that he was arrested in Miami in 1969 for the possession of one kilogram of cocaine; that he entered a plea of guilty; and that he was sentenced to three years

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* On December 11, 1974, the following letter, concerning this point, was hand delivered to the Clerk of the Court:

[Footnote continued on following page]

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
Brooklyn, N.Y. 11201

December 11, 1974

Address Reply to
United States Attorney
and Refer to
Initials and Number

HAND DELIVERED

Honorable A. Daniel Fusaro
Clerk, United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square, New York

Re: United States v. Morrell and Bruzon,
Docket No. 74-1827

Dear Mr. Fusaro:

The above captioned appeal is scheduled for oral argument on Tuesday, December 17, 1974. The panel which will hear this case has, to our knowledge, not been published. Therefore, would you kindly transmit the enclosed copies of this letter to the Judges who have been designated to hear the case.

Appellant's brief has previously been filed. Contemporaneous with this letter, the United States has submitted for filing page proofs of its brief in response. In Point I of their brief, appellants urge that reversal of their judgments of conviction is required because the Government failed to turn over to defense counsel, at the trial, documents relating to the prior arrest, plea and conviction of the informant witness, Alfredo Valdez. Appellants claim a violation of the rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963). We have urged, in response, that these particulars were elicited during the course of Valdez' testimony and that, accordingly, appellants suffered no prejudice by reason of the Government's inability to produce whatever documents might have related to the matters requested by appellants.

Late last week, in the course of preparing the Government's brief, we obtained from the Drug Enforcement Administration

[Footnote continued on following page]

two confidential files relating to Valdez. Had the existence of those files been known to the United States Attorney's office at the time of appellants' trial, which they were not, they would, as a matter of standard practice, have been given to the District Judge for his *in camera* inspection of their contents. Relevant material would have been given directly to defense counsel.

Based upon our review of those files, we believe that they do not contain any information tending to show the appellants' innocence. Moreover, we believe that they do not contain any materially impeaching information which, if "developed by skilled counsel . . ., could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction". *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). However, we believe that it would be inappropriate for our office to exercise, during the appellate process, a unilateral judgment which we traditionally forsake at the trial stage. Accordingly, we suggest three alternative courses of action:

(1) This Court should retain jurisdiction over this appeal and remand the case to the District Court for a hearing. See *United States* v. *Brawer*, 482 F.2d 117, 136 (2d Cir. 1973); or

(2) This Court should examine the two files and determine, *in camera*, whether the Government is correct in its assessment of the materials in them. Cf. *United States* v. *Badalamente*, — F.2d — (2d Cir. slip opinions, 5899, 5909; decided November 21, 1974); or

(3) This Court should permit the United States to excise those file entries which relate to the witness' testimony and include them as part of the record on appeal. Rule 10(e), F.R.A.P. In turn, we would make an additional copy of those materials available to appellate counsel for such consideration and further briefing as they may deem necessary; allowing the United States a reasonable time in which to file a responsive brief. We would also, under this alternative, submit both files, in their entirety, for this Court's *in camera* inspection.

Whichever alternative is employed, and we believe the last one is most appropriate, we would impress upon the Court the absolute necessity that these files be received *in camera* for the sole review by the Court and its staff without the participation

[Footnote continued on following page]

probation (316). In addition, the Government established that he worked as an informant after his arrest, solidified several cases and was paid for this work (317-319). The record further reflects that he began working as an informant between the time of his plea and sentencing and that he had already been sentenced prior to the arrest of appellants in the instant case (357). Thus, rather than suppressing the past criminal record of the witness as appellants claim, the Government took the initiative, revealed the impeaching material itself and deprived the defense of nothing more than the tactical advantage of bringing it up first. In sum, appellants had ample ammunition with which to impeach Valdez, see *United States* v. *Sperling*, — F.2d — (2d Cir. Slip opinions, 5637; decided October 10, 1974), who, we note, was not an accomplice witness, but rather, a highly reliable informant who had already been sentenced.*

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by defense counsel. We make this request because the files contain, for the most part, specific information concerning other, non-related investigations initiated by Valdez.

Respectfully,
DAVID G. TRAGER
United States Attorney

By: .....
PAUL B. BERGMAN
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Chief, Appeals Division

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* On July 16, 1973, by order of United States District Judge W. O. Mehrtens, Valdez was released from probation. As such, any motive on Valdez' part, stemming from his own criminal conduct, to testify falsely against appellants was thereby removed. A certified copy of Judge Mehrtens' order will be available at the oral argument of this case.

It is mistaken to suggest that the Government somehow violated its duty to ". . . provide the defense with material within the prosecutor's possession which is favorable to the defendant . . ." (Appellants' Brief, p. 17). By failing to obtain for the defense a copy of Valdez' criminal record itself—a piece of paper—which was not in the possession of the Government attorney but more importantly which did not contain material information with respect to Valdez' conviction and cooperation that was not brought out at the trial, appellants have not been prejudiced. The numerous cases cited by appellants which deal with *Brady* situations simply do not support their contentions, for, in this case, the information was provided at the trial. There was no obligation to provide it before then. See *United States ex rel. Lucas* v. *Regan*, 503 F.2d 1, 3 n. 1 (2d Cir. 1974); cf. *United States* v. *Sebastian*, 497 F.2d 1267 (2d Cir. 1974); *United States* v. *Percevault*, 490 F.2d 126 (2d Cir. 1974).

POINT II

The prosecutor's summation was proper.

In support of their argument for a new trial appellants point to the prosecutor's summation, alleging that it was improper and testimonial. In particular, appellants brand as a "misrepresentation" the prosecutor's statements that Valdez came from South America voluntarily, without threats or promises being made to him, and that he was not under compulsion by the Government when he testified (Appellant's Brief, p. 27). This argument is without merit.

In commenting on the propriety of summations, this Court has described as unquestionably permissible advocacy, the right of a prosecutor to ". . . marshal all inferences that the evidence supports . . ." *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415

U.S. 980 (1974) (dicta). See also, *United States* v. *DeFillo*, 257 F.2d 835, 840 (2d Cir. 1958), *cert. denied*, 359 U.S. 915 (1959).

In appellants' case, the Assistant United States Attorney, in his summation, argued inferences which were well supported by the record. Valdez testified that: (1) he was sentenced to three years probation in 1970 or 1971 (317); (2) he presently resided in Central America, having moved there in July of 1973 (315); (3) in both May of 1972 and at the time of his testimony there were no charges pending against him, nor had any threats or promises been made to him (349); and (4) he was not being paid for his trial testimony (350). The prosecutor did nothing more than restate these facts, as testified to by Valdez, and draw the obvious inference that Valdez was therefore under no compulsion to testify. To classify such comment as both testimonial and a misrepresentation strains the imagination. Moreover, the prosecutor's comment with respect to lack of compulsion was a proper and appropriate response to defense counsel's statement in summation that Valdez was "under the thumb of the government" (604).

In addition, it should be noted that the whole basis for appellants' attack on the Government's summation is the somewhat disingenous claim that the prosecutor's statements undermined the argument that Valdez was testifying favorably for the Government in return for an early termination of probation.* To begin with, it is nothing but the most tenuous speculation to suggest that Valdez would have fabricated testimony in order to obtain an early end to probation; and in, fact, there is nothing in the record to support such a view. Moreover, neither defense

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* Moreover, as shown by the order of Judge Mehrten's (*supra*, p. 13, n.), Valdez was, in fact, not on probation at the time of the trial.

counsel ever bothered to ask Valdez whether or not he was still on probation, nor do they now claim that he in fact was.*

Furthermore, the decisions upon which appellants rely are based on facts totally different from those in this case. In *United States* v. *Newman,* 490 F.2d 139 (3d Cir. 1974), the prosecutor, in an attempt to discount any suggestion that a deal had been made with an informant-witness, effectively testified in his summation that his office would not make such a deal. In this instance, there was no such bolstering of a witness' testimony with facts outside the record. Also completely distinguishable are the cases of *United States* v. *Drummond,* 481 F.2d 62 (2d Cir. 1973), and *Garris* v. *United States,* 390 F.2d 862 (D.C. Cir. 1968). In *Garris,* the Government attorney stated in his summation facts (as opposed to arguing inferences) which he had not been permitted to introduce in evidence, while *Drummond* involved an instance in which the prosecutor misstated testimony; attempted to use his position to bolster the testimony of Government witnesses and to undercut the testimony of defense witnesses and repeatedly expressed his personal belief in the guilt of the defendant.

In contrast, the summation of the Government in appellants' case was entirely proper. In fact, one has only to look to the words of Judge Waterman in *United States* v. *Dibrizzi,* 393 F.2d 642, 646 (2d Cir. 1968), for an apt description of the prosecutor's statements concerning Valdez:

> What appellants characterizes as misstatements of fact are really inferences drawn by the prosecutor from the evidence adduced at trial, albeit inferences differing from those which defense counsel would have drawn from the same evidence.

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* On the evidence before the jury, the fact that Valdez moved to Central America in July of 1973 and returned to testify would seem dispositive of any claim that Valdez was still on probation at the time of the trial.

POINT III

Narcotics seized in plain view of an agent lawfully on appellants' premises were properly admitted in evidence at the trial.

Appellants contend that the narcotics seized from their premises without a search warrant should have been suppressed because: (1) the Government failed to obtain a search warrant; and alternatively (2) the agents failed to announce their authority and purpose before entering the store.

With respect to appellant's first point, it has long been settled that objects within the plain view of an officer or agent who has a right to be in the position to have that view are subject to seizure without a warrant. *Harris* v. *United States*, 390 U.S. 234, 236 (1968); *Ker* v. *California*, 374 U.S. 23, 42-43 (1963); *United States* v. *Titus*, 445 F.2d 577, 579 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971); *United States* v. *Lisznyai*, 470 F.2d 707, 710 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973); *United States* v. *Candella*, 469 F.2d 173, 175 (2d Cir. 1972); *United States* v. *Cushnie*, 488 F.2d 81, 82 (5th Cir. 1973).

In the instant case, appellants apparently do not dispute that probable cause existed for their arrest. Yet, it was after having participated in the lawful execution of these arrests, that Agent Scharlatt observed the bags of cocaine. Upon entry into the store, Scharlatt went downstairs to the basement in search of Bruzon. He pursued Bruzon to the back of the basement area and, having observed Bruzon's arrest by other agents, he retraced his steps to the stairs. It was at this time, in a location he undoubtedly had a right to be in, that he observed the cocaine in plain view on the basement floor. At this point, not only could Agent Scharlatt have lawfully seized the

narcotics, as he did, but in view of the ease with which the contraband could have been destroyed,* he would have been derelict in his duty had he not done so.

The Supreme Court's decision in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which holds the plain view exception inapplicable in the instance of planned warrantless searches does not, as appellants suggest (Appellants' Brief, p. 31), control the legality of the instant seizure. The rule of *Coolidge* with respect to the issue of the plain view exception has been summarized by this Court as follows:

> . . . where the police have ample opportunity to obtain a search warrant and the intention to seize the evidence is really the prime motivation for the arrest, the plain view exception does not apply. *United States* v. *Liszynai, supra* at 710.

In the instant case, it is clear from the evidence that the prime motivation of the agents upon entry into appellants' store was not to seize evidence but to locate and arrest appellants. When Agent Scharlatt entered the premises he proceeded immediately to the basement to locate Bruzon. He observed the bags of cocaine after the arrest on his way back upstairs (13-15). See, *United States* v. *Artieri*, 491 F.2d 440, 442-443 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 142 (1974). In *Artieri*, as in the instant case, agents entered the defendants' premises upon a prearranged signal by an informant that narcotics were in the premises; the agents then found and arrested the defendants and seized the narcotics found in the area of the arrest. This Court held that the lower court misinter-

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* On this point, appellants themselves testified that they did not have sole access to and use of the basement area (488-491, 527).

preted these events in characterizing this situation as a "planned warrantless search" under *Coolidge,* and made the finding that the prime motivation of the agents was the arrest of the defendants and not the seizure of evidence. *United States* v. *Artieri, supra* at 442.

Moreover, the Fifth Circuit in discussing the inadvertant requirement of *Coolidge* in a similar arrest situation noted that:

> . . . where . . .the original entry is clearly for the purpose of making an arrest, the need for immediate apprehension makes application for an accompanying warrant impractical, and the item seized is easily destroyed contraband, the expectation that such evidence will be discovered does not preclude operation of the plain view exception to the search warrant requirement. *United States* v. *Cushnie, supra* at 82.

Thus in the instant case, the warrantless seizure of the cocaine was lawful under the traditionally recognized plain view exception to the warrant requirements.

Appellants further contend that the seized narcotics should have been suppressed because the agents failed upon entry into appellants' store to identify themselves and state their purpose allegedly in violation of the provisions of Title 18, United States Code, Section 3109.* The record is silent as to whether or not such procedures were under-

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* Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

taken.* Assuming that such procedures were not undertaken, they would not have been required in this instance.

Section 3109 was enacted in recognition of the individual's right to privacy in his home to be free from governmental intrusion. *Miller* v. *United States*, 357 U.S. 301, 313 (1958). It has been held, however, that where undercover government agents have been freely invited into the home, the formalities of Section 3109 are not required. *United States* v. *Salgoda*, 347 F.2d 216, 217 (2d Cir.), *cert. denied*, 382 U.S. 870 (1965); *United States* v. *Hutchinson*, 488 F.2d 484 (8th Cir. 1973), *cert. denied*, — U.S. —, 94 S.Ct. 2616 (1974); *United States* v. *Bradley*, 455 F.2d 1181, 1185-1186 (1st Cir. 1972), *aff'd*, 410 U.S. 605 (1973). Here, Valdez was a paid agent of the Government who had been acting in that capacity since the inception of his dealings with appellants. On May 25, 1972, he was freely invited into appellants' store to purchase illegal narcotics. He was present in the store when agents of the Drug Enforcement Administration entered and placed appellants under arrest. Under these circumstances, appellants cannot be heard to complain that their privacy was invaded by the failure of the agents to announce themselves and their purpose. See also, *Lewis* v. *United States*, 385 U.S. 206, 211 (1966).

Appellants contend, however, that the above argument was advanced by the Government and rejected by the Supreme Court in *Sabbath* v. *United States*, 391 U.S. 585 (1968). Such a contention is incorrect. In *Sabbath*, *supra*, the Government did not make an "invitee argument", as

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* Prior to the hearing, appellants did not contend that the agents failed to announce their authority. In the event that Court should find that these procedures were necessary in this instance the Government would request that there be a remand for factual hearing on this issue rather than the granting of a new trial.

above, but argued rather that the informant's life may have been endangered by an announcement—a recognized exception to the requirements of Section 3109. See, *United States* v. *Manning*, 448 F.2d 992, 1001 (2d Cir.) (en banc) *cert. denied*, 404 U.S. 995 (1971). The Supreme Court found simply that there was no basis in the record for assuming there was any such danger. *Sabbath, supra*, at 591. In any event, the informant in *Sabbath* was not an agent of the Government in the same sense as Valdez. Rather than being a long standing paid Government informant, he was a momentary convertee—a narcotics delivery man arrested at the airport who agreed to take agents to the point of his delivery.

It should be further noted that the evidence suggests that the agents followed closely behind Valdez through an open door into appellants' store (23, 120). Mere unannounced entry through an open door has been held not to constitute a "breaking" within the meaning of Section 3109. *United States* v. *Conti*, 361 F.2d 153, 157 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968); *United States* v. *Monticallos*, 349 F.2d 80, 82 (2d Cir. 1965) (dicta); *United States* v. *Marson*, 408 F.2d 644, 646 (4th Cir. 1968), *cert. denied*, 393 U.S. 1056 (1968); *United States* v. *Rowolette*, 397 F.2d 475, 479 (7th Cir. 1968); *Ng Pui Yu* v. *United States*, 352 F.2d 626, 632 (9th Cir. 1965).

In addition, a further recognized exception to the Section 3109 rule of announcement is a well-founded belief on the part of the agents that such an announcement will result in the destruction of the evidence. *Ker* v. *California*, *supra* at 40; *United States* v. *Manning*, *supra* at 1001. Here, the agents were aware prior to their entry that at least two defendants were involved and that the premises consisted of a first floor and basement which had to be entered through a trapdoor (10, 22). Under these circumstances, the agents were well aware that an announcement

could have easily led to destruction of the evidence in the basement by one of the defendants before agents would have been able to arrive in the basement.

In view of the foregoing, it is apparent that an unannounced entry into appellants' store would have violated neither the Fourth Amendment nor Section 3109 of Title 18.

POINT IV

The District Court properly refused to compel the disclosure of the informant's identity.

Appellants claim that the failure of the District Court to compel the Government to disclose the identity of a confidential informant requires a new trial. Although appellants failed to advise the trial court why disclosure of informant's identity was desired (266-268), they now claim on appeal that the confidential informant's testimony may have impeached the credibility of Valdez.

The Supreme Court in *Roviaro* v. *United States*, 353 U.S. 53, 60 (1957), held that the Government's privilege to refuse to disclose the identity of its informants at trial is not absolute where the informant's identity may be "relevant and helpful to the defense of an accused" or "essential to a fair determination" of the issues. This Court, however, has noted that this language is not to be read with "extreme literalness' in view of further qualifying comments by the Court in the *Roviaro* decision. *United States* v. *Soles*, 482 F.2d 105, 109 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973). At page 62 of the *Roviaro* opinion, the Court made the following statement:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right

> to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of informer's testimony, and other relevant factors.

The defendant is required to establish at trial why his request for the identity of the informant is beyond the limits of the privilege. It is in fact mandatory that some showing be made of one or more of the factors outlined above in the *Roviaro* opinion before disclosure will be required. *United States* v. *Casiano*, 440 F.2d 1203, 1205 (2d Cir.), *cert. denied*, 404 U.S. 836 (1971).

In the instant case, no showing was made at trial why the informant's testimony would have been relevant or essential to the determination of the issues. Indeed, no more than a perfunctory request was made for his identity. See, *United States* v. *Commissiong*, 429 F.2d 834, 839 n. 8 (2d Cir. 1970) and cases cited therein. On appeal, appellants now contend that the informant was a participant in the alleged conspiracy and a witness to the initial conversation—the only third person who could corroborate or contradict Valdez' testimony that his relationship with the appellants was narcotics connected (Appellants' Brief, p. 35). A careful reading of the record, however, reveals that the informant did nothing more than introduce Valdez to the informants and promptly depart (149; 323). He was not a witness to any narcotics discussions or transactions between the three men. Thus, he would not be in a position to testify to the "innocence" of their relationship.

In sum, where, as in this case, informants have been mere introducers and have not been central participants in the criminal transactions, this Court and others have

consistently upheld nondisclosure. *Rugendorf* v. *United States*, 376 U.S. 528 (1964); *United States* v. *Soles*, 482 F.2d 105, 108-110 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973); *United States* v. *Russ*, 362 F.2d 843 (2d Cir.), *cert. denied*, 385 U.S. 923 (1966); *United States* v. *Coke*, 339 F.2d 183 (2d Cir. 1964); *United States* v. *Camacho*, 423 F.2d 707 (9th Cir. 1970); *United States* v. *Skeens*, 449 F.2d 1066 (D.C. Cir. 1971).

CONCLUSION

The judgments of conviction should be affirmed.

Dated: December 11, 1974

Respectfully submitted,

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AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK } ss

PAUL B. BERGMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of December 1974 he served two copies of the within Brief for the Appellee by placing the same in a properly postpaid franked envelope addressed to:

Barry Ivan Slotnick, Esq.
15 Park Row
New York, N. Y. 10038

George L. Santangelo, Esq.
253 Broadway
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and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

PAUL B. BERGMAN

Sworn to before me this
13th day of December 19 74

OLGA S. MORGAN
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No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975